IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RALPH WILKENS CO., INC., an Arizona corporation, Plaintiff/Appellee, v. PATRICK H. and MARY D. DYKES, husband and wife, dba PATRICK'S ANTIQUE CARS & TRUCKS, a sole proprietorship, Defendants/Appellants.	2 CA-CV 2005-0078 DEPARTMENT A SUPPLEMENTAL MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

ON MOTION FOR RECONSIDERATION

Pinal County Cause No. CV 2003-00990

Honorable Janna L. Vanderpool, Judge

GRANTED

Hunsaker & Palecek, PLLC
By James J. Palecek — Phoenix
Attorneys for Plaintiff/Appellee

Patricia A. Taylor — Tucson
Attorney for Defendants/Appellants

V Á S Q U E Z, Judge.

¶1 On February 9, 2007, this court issued its memorandum decision in this appeal from a default judgment entered against Mary Dykes as a sanction for her failure to comply with discovery orders. *Ralph Wilkens Co. v. Dykes*, No. 2 CA-CV 2005-0078 (memorandum decision filed Feb. 9, 2007). We affirmed the judgment in part, vacated the award of attorney fees and costs, and remanded the case to the trial court, directing it to recalculate attorney fees and costs. Mary filed a motion for reconsideration, and having considered the motion and Ralph Wilkens Co. having failed to respond, despite having been ordered to do so, we issue this supplemental memorandum decision. Paragraphs one through thirty-six of the memorandum decision remain the same, but the remainder of the decision is replaced by the following paragraphs.

Bankruptcy Settlement Agreement

¶37 Lastly, Mary and Taylor contend this entire matter was settled when an agreement was reached in the bankruptcy proceeding filed by Patrick Dykes sometime during the judgment enforcement proceedings. They argue this issue was properly raised below in a post-judgment motion filed after their notice of appeal, but the trial court never ruled on it. They contend this court should, "[a]t the very least, . . . remand this issue for a factual determination." We stayed the appeal in this case and remanded it to the trial court, permitting it to decide this issue. We now review the court's ruling.

¶38 Mary and Taylor filed their initial notice of appeal on January 13, 2005. On February 2 they filed in Pinal County Superior Court a "motion for new trial, rehearing, to set aside judgment and to dismiss based upon settlement, accord and satisfaction and res judicata; motion to dismiss claim; motion to set aside judgment." The trial court initially refused to consider the motion because the case was pending on appeal. However, it later held an order to show cause hearing at which it considered the alleged bankruptcy settlement agreement and its purported effect on the judgment against Mary and Taylor.[5]

¶39 At the hearing, the trial court stated "it appears to the Court that there was no agreement. As far as settlement, if there had been, it would have been in writing. It would have been capable of being discharged within one year. And clearly neither one of these applies. . . . It is my order affirming the judgment." Thus, the trial court appears to have based its decision on A.R.S. § 44-101, the statute of frauds. Section 44-101(5) requires agreements that cannot be performed within one year to be in writing and signed by the party to be charged to be enforceable. Although we disagree with the trial court's reliance on the statute of frauds, we can affirm its ruling if it is correct for any reason. *See Wolfinger v. Cheche*, 206 Ariz. 504, ¶ 58, 80 P.3d 783, 796 (App. 2003).

¶40 Rule 80(d), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, provides: "No agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in

[5]Taylor was apparently unable to attend the hearing because she was representing a client in a criminal matter in Tucson.

writing, or made orally in open court, and entered in the minutes." Mary and Taylor do not contend that a written settlement agreement purportedly reached in the bankruptcy proceeding had been introduced at the order to show cause hearing in the trial court below. At the hearing Mary asserted that Mr. Palecek had agreed to a settlement during a "video interview" with the bankruptcy judge, but she could not produce any documentation to support this claim. And, the documents she provided to the trial court demonstrated only that the parties were attempting to reach an agreement, not that one had ever been reached.

¶41 The trial court's minute entry following the hearing did not specifically address the bankruptcy issue or Mary and Taylor's motion. Wilkens filed a request to clarify the ruling, but the trial court did not rule on it because of the pending appeal. After this court granted a stay of the appeal, the trial court clarified its earlier ruling by minute entry, stating "[Mary and Taylor]'s Motion to Set Aside Judgment was previously denied. No further clarification should be necessary" and effectively affirmed its prior judgment. Thus, the trial court did not abuse its discretion in finding that no collateral bankruptcy settlement agreement existed that resolved this case.

CONCLUSION

¶42 Because the trial court did not address the merits or rule on Mary's motion to dismiss, which challenged the validity of the underlying judgment, we do not address the validity of that judgment on appeal. We conclude, however, that the trial court did not abuse its discretion in implicitly ruling, as a sanction under Rule 37(b)(2), that Mary,

through her misconduct, forfeited her ability to challenge the underlying judgment. Nor did the trial court abuse its discretion in awarding attorney fees, interest, and costs against Mary and Taylor, jointly and severally. However, the court erred in awarding Wilkens fees unrelated to a violation of the court's discovery orders. Accordingly, we affirm the judgments in part, vacating only that portion awarding attorney fees and costs and interest for the time period preceding a violation of any court orders and not related to such violations. We further remand this matter to the trial court so that it may recalculate fees, costs, and interest consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PETER J. ECKERSTROM, Judge